IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

WP No. 111 (M/S) of 2002 decided on 16-03-2004.

State of Uttaranchal Vs. District Judge, Uttarkashi & others.

A.F.R. (Approved for reporting)

~~Not approved for reporting~~

Date 16/3/04. Initials of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

In the High Court of Uttaranchal at Nainital.

W.P. No. 111 (M/S) of 2002

State of Uttaranchal through Collector

Uttarkashi ……. Petitioner.

Vs.

1. District Judge, Uttarkashi,
2. Narayan Dutt Joshi, S/o Late Sri Vidyadhar Joshi, R/o Nagendra Saklani Road, Uttarkashi
3. Gopal Dutt S/o Late Sri Hari Shankar Josiyara Uttarkashi ..…Respondents.

Sri N.C.Gupta learned Standing Counsel for the petitioner.

Sri S.K.Jain, learned counsel for respondent nos. 2 and 3.

Date of judgment : 16-03-2004

Hon'ble Irshad Hussain, J.

By means of this writ petition under Article 227 of the Constitution of India, the petitioner-State made a prayer to issue a rule, order or direction in the nature of certiorari to set aside the impugned judgment and order dated 22.12.2001 (Annexure-4) passed by respondent no.1, District Judge Uttarkashi. Brief facts relevant for the decision are as below:-

That revenue suit no. 15 /1983-84 under section 33/39 U.P. Land Revenue Act, 1901 was registered at the instance of Tehsildar Bhatwari, district, Uttarkashi against the respondent nos.2 and 3. It was pointed that due to clerical mistake the names of these respondents have wrongly been recorded against plot khasra no.2723 instead of khasra no. 2713. The said suit after contest by these respondents was decided by Assistant Collector in favour of the petitioner per judgment and order dated 12.2.1985 and the necessary correction was made in the revenue records.

That after about ten years respondent no.2 filed a regular civil suit no.19/1995 for relief of permanent injunction against the petitioner making respondent no.3 as formal defendant to restrain the petitioner from interfering in his possession over plot khasra no. 2724

as well as plot khasra no. 2723 (which was subject matter of the aforesaid revenue suit).

That the aforesaid civil suit was decreed exparte on 12.2.1998 and an application under Order 9 Rule 13 of the Code of Civil Procedure (for short 'Code') to set aside the exparte decree was preferred within the period of limitation by the petitioner and the same was registered as Misc. case no. 4/1998 before the trial court. The ground taken to have the exparte decree set aside was that the learned District Government Counsel (Civil), Uttarkashi was busy in some other cases pending in the courts on 12.2.1998 and could not appear in the above noted case when the case was called out by the trial court. The D.G.C.(Civil) Sri Jaiveer Singh Bisht filed his own affidavit in support of the said contention and the application to set aside the exparte decree. The respondent filed objections pointing out mainly that the order to proceed exparte in the original suit was passed on 15-9-1997 and that no cause for the absence of the learned D.G.C.(Civil) or any of the Pairokar of the petitioner-defendant in the court on the said date has been shown. The trial court however found that the sufficient cause for absence had been shown the application under Order 9 Rule 13 C.P.C. was allowed on 10-7-1998 on payment of cost and the exparte judgment and decree dated 12.2.1998 was set aside.

That aggrieved by the said order a revision was preferred under section 115 of the ' Code' and the same was registered as civil revision no. 9/1998. Learned District Judge Uttarkashi found favour with the argument of the respondent-revisionist that the learned trial court had filed to consider the important aspect that no sufficient cause for absence on 15-9-1997 when the order to proceed exparte was passed, had been shown and therefore the illegality in allowing the application under Order 9 Rule 13 of the 'Code' had been made and by allowing the said revision the order of the trial court dated 10-7-1998 was set aside. This is how it gave cause to the petitioner to file the present petition against the said judgment and order dated 22.12.2001.

The learned Standing Counsel drew attention to the facts of the case and submitted that the application under Order 9 Rule 13 of the

'code'. and the affidavit of the D.G.C. (Civil) filed in support of the same amply proved that the petitioner was prevented by sufficient cause from appearing before the court when the suit was called on for hearing and that in the peculiar facts and circumstances of the case the revisional court should not have taken a very strict and technical view that no reference of the date 15-9-1997, when the order to proceed exparte was passed by the trial court was available in the application as well as in the affidavit, and that the sufficient cause as occurring in Order 9 Rule 13 of the 'Code' should have been liberally construed as has been rightly done by the learned trial court in allowing the application to set aside the exparte judgment and decree. On the other hand learned counsel for the respondents-plaintiff argued that firstly the application under Order 9 Rule 13 of the 'Code' was not legally maintainable in view of the decree having been passed under Order 8 Rule 10 C.P.C. and secondly because the petitioner-defendant has failed to show that he was prevented by sufficient cause from appearing before the court on 15-9-1997, the date on which the order to proceed exparte was passed by the trial court. It has further been submitted that the petitioner-defendant had been given time to file written statement on more than 10 dates and even once on 23-6-1997 the order was passed to proceed exparte in the suit and the said order was set aside on 7-8-1997 on payment of cost but neither cost was paid nor written statement was filed in time as given that the conduct of the petitioner-defendant had alone being to intentionally delay the disposal of the suit on merit. The learned counsel also placed reliance on the following decisions:-

1- **Trader's Bank Ltd. Vs. Avtar Singh , A.I.R. 1988 Delhi- 55.**
2- **Bishan Singh vs. IXth A.D.J., Agra and others Allahabad Rent Cases, 1996(2) page 675.**

At the outset it need to be stated that the submission of the learned counsel for the respondent that the decree was passed by the trial court under Order 8 Rule 10 C.P.C., therefore the application for setting aside the decree under Order 9 Rule 13 C.P.C. was not legally maintainable, is unwarranted. From perusal of the order dated 15-9-

1997 it is evident that the trial court passed the order as contemplated under Order 9 Rule 6 (1)(a) C.P.C. when on the date fixed in the suit the plaintiff appeared but defendant remained absent and the court passed the order that the suit shall be heard exparte. The trial court at no stage contemplated passing any order under Order 8, Rule 5 (2) or Rule 19 C.P.C. under which the court is required to pronounce judgment against the defendant or to pass such order in relation to the suit as it think fit. Therefore I need not dwell on the said submission and that an application under Order 9 Rule 13 C.P.C. was legally maintainable.

The facts of the two reported decisions mentioned above were at variance because in both the cases the impugned decrees were found to have been passed under the provisions of Order 8 C.P.C. The submission therefore need not detain me any longer.

Order 9, Rule 13 of the Code of Civil Procedure insists that the applicant must satisfy the court two conditions (a) that the summon was not duly served and (b) that the applicant was prevented by any sufficient cause for appearing before the court when the suit was called on for hearing. In the instant case first condition is not attracted.

In regard to the argument of the learned counsel for the petitioner that the petitioner was prevented by sufficient cause from appearing before the court when the suit was called on for hearing it need to be mentioned at the outset that it is well settled that the words " was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties. As stated above the order to proceed exparte under Order 9 Rule 6 of the 'Code' was passed on 15-9-1997 and the date fixed for exparte hearing was 22-9-1997. The exparte statement of plaintiff-respondent was recorded on 22-9-1997 and the case was posted on 16-10-1997 for exparte arguments. Before the exparte judgment and decree could be passed in the case the plaintiff- defendant moved application (paper no. 39-c) together with written statement which is on the record to set aside the order dated 15-9-1997. The application

was moved on 4.12.1997 and the same was dismissed by order dated 9-12-1997 on the premise that the exparte hearing of the suit had been concluded and only exparte judgment need to be pronounced in the case. The exparte judgment was however delivered on 12.2.1998. In the application filed on 4.12.1997 the cause for non filing of the written statement earlier i.e. on 15.9.1997 was shown by making averment that the defendant-state did not knowingly avoid filing of the written statement as the same could not be filed due to submission of the narrative of the case at a late stage. Although the same reason has not been repeated in the application under Order 9 Rule 13 C.P.C. but I can not lose sight of the fact that there is specific averment in the application as well as in the affidavit of the learned D.G.C. (Civil) Sri Jaiveer Singh Bisht that the petitioner-defendant did not knowingly avoid appearance in the case when it was called up for hearing on 12.2.1998 when the judgment was delivered and at the same time it had been asserted that the learned counsel was not negligent in attending the court as he was busy in the hearing of other cases in other courts on behalf of the state. As stated above the learned trial court was of the view that the defendant-stated was prevent by sufficient cause from appearing before the court and allowed the application under Order 9 Rule 13 C.P.C. by order dated 10-7-1998 on payment of cost to the other party that is the respondent-plaintiff.

Inspite of the above material on record as submitted by the learned Standing Counsel the revisional court took a strict and technical view of the attracted condition of Order 9 Rule 13 of the 'Code' in observing that the defendant-state has not shown any sufficient cause for non appearance in the case on 15-9-1997 and only cause for absence on another daed i.e. 12.2.1998 when the exparte judgment was delivered by the trial court has been shown and therefore aforesaid order of the trial court was termed as without jurisdiction and against the spirit of the provision of Order 9 Rule 13 of the 'Code'. The learned revisional court also observed that the defendant-state has been negligent in the past also and the written statement was not filed in time despite number of dates given for the said purpose and further that even once the order of exparte hearing

passed in the case was set aside on payment of cost which was not even paid by the defendant-state. It need to be mentioned that for the purpose of the disposal of the application under Order 9 Rule 13 of the 'Code' of defendant-state could not have been penalized for its earlier inaction or negligence referred therein by the learned revisional court. There can be no doubt that from the application under Order 9 Rule 13 of the 'Code' and the affidavit filed in support thereof as well as material on record as referred above in the form of earlier application and the written statement filed on 4.12.1997, sufficient cause for non-appearance before the court even on 15-9-1997 had been shown and the learned revisional court made an error in ignoring the same while setting aside the order passed by the trial court to set aside the exparte decree. On the face of the facts of the case I am not impressed by the arugment of the learned counsel for the respondent-plaintiff that the cause shown earlier in regard to the non appearance on 15-9-1997 can not be taken into consideration at the time of the consideration of the sufficient cause as appearing in Order 9 Rule 13 of the 'Code'. It will be advantageous to refer to a decision of the Supreme Court in the matter of **G.P. Srivastava vs. R.K. Raizada and others, A.I.R. 2000 Supreme Court 1221** weherein it had been reiterated that under Order 9 Rule 13 of the 'Code' an exparte decree passed against the defendant can be set aside upon satisfaction of the court that either the summons were not duly served upon the defendant or he was prevented by any sufficient cause from appear when the suit was called on for hearing. The Hon'ble Judges of the Court also laid stress that the words "was prevented by any sufficient cause for appearing" must be liberally construed to enable the court to do complete justice between the parties when no negligence or inaction is imputable or erring party. Sufficient cause for the purpose of Order 9 Rule 13 of the 'Code' has to be construed as elastic expression for which no hard and fast guide lines can be prescribed. The courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of the each case. The principle laid down in the decision while being applied to the peculiar facts and circumstances of the case as stated

above warrant a clear finding that the record of the case establish that thepetitioner-state was prevented by sufficient cause from appearing before the court when the suit was called on for hearing on 15.9.1997. Therefore the discretion exercised by the trial court in setting aside the exparte decree can not be said to be unjudicious even if the learned trial court has not specifically referred to the material available on record in regard to the cause for non appearance on 15-9-1997 and therefore the order of the trial court could not have been said to be unjust and improper and having been passed without jurisdiction. The revisional court therefore erred in interfering with the discretion exercised by the trial court. The impugned order dated 22.12.2001 therefore can not legally be sustained and the same deserve to be quashed.

For the reasons aforesaid the writ petition is allowed and order or direction in the nature of certiorari to set aside the impugned order dated 22-12-2001 (Annexure-4) passed by the respondent no.1 is issued. No order as to costs.

It is directed that the Registry shall immediately sent back the record of the lower court which shall decide the suit expeditiously, preferably, within a period of two months from the date of the receipt of the copy of the order and the record.

(Irshad Hussain, J.)

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